STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Craig Erhard and Paula Erhard,
Plaintiffs Below, Petitioners

vs) No. 11-1595 (Marion County 08-P-93)

David Helmick and Kevin Helmick,
Defendants Below, Respondents

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Craig and Paula Erhard, by counsel Stephen S. Fitz, appeal from the Circuit Court of Marion County's "Opinion/Order" entered on June 22, 2011, following a bench trial in this action involving what is essentially a boundary dispute. The circuit court entered judgment in favor of petitioners, in part, and in favor of respondents, David and Kevin Helmick, in part. Respondents, who are represented by counsel Philip C. Petty, have filed cross-assignments of error.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioners and respondents are next-door neighbors in the George D. Boyd Subdivision, also known as "Fairmont Farms," located in the City of Fairmont, West Virginia. Petitioners acquired their property in 2004, and respondents acquired their property in 1983. Petitioners originally sought injunctive relief against respondents in relation to respondents' construction of a fence, but the litigation expanded to include what the parties refer to as the "Northerly Road," the "Westerly Road," and the "Pig Trough." Respondents filed a counterclaim seeking, among other things, damages for the destruction of trees on their property.

During the course of the bench trial, the circuit judge visited the subject property in the presence of the parties. Following the parties' presentation of evidence and their submission of proposed findings of fact and conclusions of law, the circuit court entered its "Opinion/Order" on June 22, 2011. The circuit court found in favor of respondents in relation to the "Northerly Road" and in favor of petitioners in relation to the "Pig Trough." As to the "Westerly Road," the circuit court directed that the parties share that road with its northern boundary being that as delineated on the 1960 Boyd-Collins Plat (an exhibit below). With respect to respondents' construction of a fence, the circuit court ruled that any such fence should follow the boundary

line delineated in the 1960 Boyd-Collins Plat but not cross the "Pig Trough" and, instead, to follow the line created by the northerly edge of petitioners' raised patio ending at the northern drive bordering the next lot in the subdivision. The parties assign as error those portions of the circuit court's "Opinion/Order" not in their favor.

When reviewing a circuit court's judgment reached following a bench trial, this Court has previously held that:

> In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). The circuit court's "Opinion/Order" summarizes the evidence presented by the parties below and addresses the parties' respective legal arguments. We have reviewed the parties' briefs and legal arguments concerning the assignments of error that each have raised, as well as the appendix record. We have also reviewed the circuit court's judgment utilizing the standard of review set forth above and find that there is no clear error in the circuit court's findings of fact and no abuse of discretion in its ultimate disposition. Accordingly, we incorporate and adopt the circuit court's findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's "Opinion/Order" entered on June 22, 2011, to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin

11-1595

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

CRAIG ERHARD and
PAULA ERHARD,

Plaintiffs,

v. CIVIL ACTION NO. 08-P-93

DAVID HELMICK and
KEVIN HELMICK,

Defendants.

2011 JUN 22 AM 10 [illegible]
CIRCUIT CLERK

OPINION/ORDER

This case came before the Court on 26 April 2011 for a bench trial. The plaintiffs, Craig and Paula Erhard, were present in person and were represented by Stephen S. Fitz, Esquire; the defendants, David and Kevin Helmick, were present in person and were represented by Philip C. Petty, Esquire.

Having reviewed the testimony, evidence and arguments of the parties, and having researched the legal issues presented, the Court is of the opinion that judgment should be rendered in favor of the plaintiffs, in part, and in favor of the defendants, in part. In support of these verdicts, the Court makes the following findings of fact and conclusions of law:

ENTERED 6-22-11 ORDER BOOK 31 PAGE 612

Findings of Fact

1. The plaintiffs and defendants are next-door neighbors. The plaintiffs filed the "Petition/Application for Preliminary Injunction" on 20

August 2008, alleging that the defendants intended to erect a fence across a concrete patio appended to the plaintiff's house, located at 929 Farms Drive in Fairmont. The plaintiffs further allege that a portion of the patio at issue is located within a twenty-foot reservation, commonly referred to as the "Northerly Road." The plaintiffs contend that the patio was conveyed to the plaintiffs when they purchased the property. The plaintiffs allege that the defendants have attempted to block another twenty-foot right-of-way, commonly referred to as the "Westerly Road," with a circle of stone and shrubbery. Finally, the plaintiffs contend that they are the owners of the area of the patio commonly known as the "Pig Trough" because it is appended to their house and was conveyed to the plaintiffs when they purchased the property.

2. The defendants filed an answer and counterclaim on 22 August 2008. The defendants argue that the Northerly Road was never dedicated to the public and was abandoned by deed in 1960. The defendants contend that the plaintiffs block the Westerly Road with their automobiles and construction supplies. They argue further that the stone circle and shrubbery do not block the plaintiffs' access to the

plaintiffs' garage, and the "obstructions" have been there for a period of no less than ten (10) years. Finally, they argue that the Pig Trough was never conveyed to the plaintiffs by deed and that the defendants remain the owners of that small area of land.

3. Plaintiff Craig Brhard, Esquire, testified that the property in question was purchased by the plaintiffs in April 2004. He testified that the Westerly Road is where most of the friction exists between the parties. The plaintiffs park their vehicles there and, during construction, their contractors parked there as well. He testified that the defendants attempted to build a fence along the northerly side of the property and across the Pig Trough. The fence sparked the current litigation. He testified that since the plaintiffs purchased the property, the defendants have planted bushes and placed piles of logs on the area where the Northerly Road would exist. He stated that the rocks that obstruct the Westerly Road appeared sometime between the viewing of the house and the purchase by the plaintiffs. He further stated his desire that the Northerly Road be a "buffer" between the plaintiffs and the defendants.

4. The plaintiffs also called Catherine Collins-Binks to testify. She testified that she lived in the house from 1958 to 1963. She stated that during renovations they saw pig troughs and pig pens under the kitchen area and adjacent to the patio. She stated that her family used the "last third" of the Westerly Road to park cars either just outside or directly in the garage. She had no recollection of a stone wall cutting off the Westerly Road. She further testified as to the details behind the 1961 Collins-Boyd deed. But, as the document is clear in its meaning and intent, there is no need to examine her testimony or the possible Dead Man Statute issues.

5. Defendant David Helmick testified that the defendants have lived on their property since 1982. He stated that the deed to the defendants' property has the Northerly Road within its boundaries. He testified that most of the trees and shrubs are in the same positions they were in when the defendants moved into the property. He testified that where the circle of stones are on the Westerly Road, there were flowers when the defendants moved in during 1981. He stated that he gave a copy of the plat to all prospective buyers at the auction of the plaintiffs' property

sometime in 2004. He testified that he wanted all buyers to understand that the Westerly Road was only for ingress and egress from the garage. Mr. Helmick testified that the defendants maintained the area behind the plaintiffs' house, and used the Westerly Road to access that area perhaps five or six times per year. He further claimed that the Pig Trough was always owned by the defendants and maintained by the defendants one to two times per year. His hope was that the fence along the northern edge of the plaintiffs' property could be constructed and be used as a demilitarized zone between the parties.

6. Kevin Helmick then testified to the actions of the plaintiffs in the past. She presented the Court with numerous photographs cataloging such misdeeds as: the removal of an iron pin; the depositing of construction supplies on the Westerly Road; the painting of doors on the Westerly Road; the removal of the defendants' trees; and the parking of several automobiles on the Westerly Road. She testified that four of the defendants' trees have been destroyed by the plaintiffs, each valued at $80 (eighty dollars). She also admitted to spray-painting the line through the Pig Trough area.

Conclusions of Law

1. "When lands are laid off into lots, streets, and alleys, and a map, plat thereof is made, all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of such lots." Cook v. Totten, 49 W.Va. 177, 38 S.E. 491 (1901).

2. "Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced." West Virginia Code §36-3-10.

3. "Where an owner of land has the same platted in lots, streets and alleys, and conveyances are made by his successors in title, in which references are made to the map and alleys, and which land is subsequently occupied by a number of purchasers of lots and there is a user by the public of the greater part of the platted streets and alleys, the non-user of a portion thereof and occupancy or encroachment by abutting landowners do not affect the right of the public or an abutting owner to use all such alleys in

their entirety." Huddleston v. Deans, 124 W.Va. 313, 21 S.E.2d 352, 356 (1942).

4. The first dispute to be resolved is the status of the "Northerly Road." This area was originally reserved as a private drive, and is described as such in almost every deed through the plaintiffs' property's chain of title. There is no evidence at all that this drive was ever dedicated to the public, unlike Farms Drive. As this road was not dedicated to or used by the public, Huddleston and the "Unity Rule" do not apply. This reservation, as well as a portion of the reservation that creates the Westerly road, was discontinued by virtue of the Boyd-Collins 1960 deed. (See, Defendants' Exhibit #5, Marion County Deed Book 623 Page 446.) Because the reservation was discontinued, there is no "Northerly Road," and the defendants are entitled to judgment in that regard.

5. The second dispute is the ownership of the area known as the "Pig Trough." This portion of land is briefly described as the nearly square six foot by six foot area between the "raised patio" and Lot #10. A line extending from the northern edge of the "raised patio" acts as the northern boundary. The plaintiffs are correct in asserting that this very small area of

concrete (a portion of which appears to have devolved into a minuscule garden) is attached to the residence. As this area of concrete is attached and appears to have always been attached to the residence, it was conveyed by the original 1941 Boyd-Colpitts deed. (See, Defendants' Exhibit #1, second paragraph.) This area's only logical user and owner is the party who owns Lot #9, the plaintiffs. Because the 1941 Boyd-Colpitts deed conveyed "the improvements thereon and the appurtenances thereunto belonging" to Lot #9, the plaintiffs are entitled to judgment in that regard.

6. The final dispute is over the private gravel drive known herein as the "Westerly Road." First, we must look at the language contained in the 1941 Boyd-Colpitts deed:

> "[the owners of Lot #9] shall have the right of ingress to and egress from the garage located on the west side of the building on the lot herein conveyed, over that certain road as shown on the plat recorded ... and in addition thereto the use of the road on the western side of said lot."

Obviously, the plaintiffs have the right of ingress to and egress from their garage. The plaintiffs also have a right to "the use of the [Westerly] road." This language seems plain and unambiguous. The plaintiffs

have the right to use the Westerly Road, which naturally allows them the right to park vehicles on the road in such a way as to not block the vehicular traffic on that twenty-foot wide road.[1] It should be added, however, that if half of the road is taken up by the plaintiffs' obstacles (for example: vehicles) and the other half of the road taken up by the defendants' obstacles (for example: rocks and shrubs), the plaintiffs must move their obstacles if the plaintiffs wish to access the rest of the road, and the defendants must move their obstacles if the defendants wish to access the rest of the road.[2] Neither party should ever completely obstruct the entire twenty-foot width of the road, for any reason. Further, the northern boundary of the Westerly Road is as delineated on the 1960 Boyd-Collins Plat, marked Defendants' Exhibit Number Five.

7. In summation: the Westerly Road may be parked on, but not blocked; the "Pig Trough" area is attached to the plaintiffs' house and therefor owned by the

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[1] The average automobile is just under six feet in width.

[2] The defendants argument that their circle of stones and "shrubs" constitute an adverse possession is incomplete in almost every element. There is nothing "possessive," "open and notorious," "exclusive," or "hostile" about a patch of greenery growing out of control. (See, Williams v. Snidow, 31 Va. (4 Leigh) 14, 1832 Va. LEXIS 28 (1832).)

plaintiffs; and the Northerly Road, as well as a portion of the Westerly Road, was previously discontinued. Returning to the original issue in this matter, if the defendants wish to resume the construction of their fence, they may do so by following the boundary-line delineated in the 1960 Boyd-Collins Plat, but the fence should not cross the Pig Trough. Instead, the fence could continue along the line created by the northern edge of the raised patio, ending at the northern drive bordering Lot #10.[3]

Accordingly, it is **ORDERED** that the judgment should be found in favor of the plaintiff, in part, and in favor of the defendant, in part, as previously described.

The Circuit Clerk of Marion County is directed to provide certified copies of this "Opinion/Order" to Stephen S. Fitz, Esquire at 726 East Park Avenue, Fairmont, West Virginia 26554;

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[3] The Court sincerely hopes that by it detailing how the parties will use the Westerly Road and where the fence should be that the parties will have no need to further even discuss property matters. Both parties have used incredible amounts of time, effort, capital and sanity in litigating trivial claims...claims that could have been cordially settled on a back porch in twenty minutes, or at least in mediation years ago. By relieving the parties of their need to communicate, perhaps this litigation will not be repeated.

and to Philip C. Petty, Esquire at Rose, Padden & Petty, L.C., Post Office Box 1307, Fairmont, West Virginia 26554.

ENTER: 22 JUNE 2011

FRED L. FOX, II,
SENIOR STATUS JUDGE

A COPY TESTE
Barbara A. Core
CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA